KARUPPANNAN S/O CHELLAPAN

v.

BALAKRISHNEN S/O SUBBAN

FEDERAL COURT, KUALA LUMPUR
DATO' PEH SWEE CHIN FCJ
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH FCJ
DATO' HAJI LAMIN BIN HAJI MOHD YUNUS FCJ
[CIVIL APPEAL NO. 02-70-92]
23 SEPTEMBER 1994

TORT: Trespass to land - Landowner granted permission to build protrusions to existing building - Protrusions encrocaching on adjacent lot - Adjacent lot vacant - Permission granted on condition that they will be removed when adjacent lot occupied - Defendant purchasing property from landowner - Plaintiff becoming owner of adjacent lot - Plaintiff requesting removal of protrusions - Defendant refusing - Plaintiff obtaining interlocutory mandatory injunction - Defendant appealing against order - Whether there was trespass to the plaintiff's land - Whether defendant bound by undertaking given by previous landowner - Whether injunction should be discharged.

LAND LAW: Protrusions to existing building - Protrusions encroaching on adjacent lot - Landowner undertaking to remove protrusions - Whether such undertaking capable of being endorsed on the title - Application of s. 120 National Land Code 1965 - Whether such undertaking was a "condition" within the meaning of s. 116(1) of the Code.

The plaintiff/respondent is the owner of a piece of land in Brinchang, Cameron Highlands (Lot 25). The owner of the adjacent lot (Lot 26) had obtained permission for the erection of protrusions to her building for decorative purposes. At the time permission was given, Lot 25 was a vacant lot. Permission was given on the undertaking that the protrusions would be removed when the purchaser of Lot 25 wished to construct a building on the said lot.

The plaintiff obtained permission to build a four storey hotel on Lot 25 and requested the defendant/appellant, who had become the owner of Lot 26, to remove the protrusions. The defendant refused and the plaintiff obtained an interlocutory mandatory injunction ordering the defendant to remove the protrusions and all other encroachments encroaching on Lot 25. The defendant appealed.

Held:

[1] The undertaking to remove the protrusions, which are really decorative in nature, cannot come within the requirement of s. 120 of the National Land Code 1965 (NLC 1965) and therefore are not capable of being endorsed on the title and so will not be tracable at the Land Office. Neither is the undertaking a type of "condition" that is envisaged in s. 116(1) NLC 1965. The protrusions were more in the nature of trespass to air space.

[2] The NLC 1965 provides *inter alia* that any person to whom land has been alienated "shall be entitled to the exclusive use and enjoyment of so much of the column of air space above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land." In the circumstances, the owner of Lot 26 has no legal right to encroach into the air space of Lot 25 unless the owner of Lot 25 allows it.

[3] In the case of a trespass to land and air space committed by the owner of an adjacent lot as serious as in this case, the aggrieved owner of the lot upon which the trespass is committed is entitled to an interlocutory mandatory injunction by which to have the source of trespass removed notwithstanding that the source of the trespass had already been in existence before the new owner came to own the land and whether he knew or had notice of it or not. Being the current registered owner the applellant is duty bound to remove the protrusions.

[4] As the respondent has established his legal right and the fact of its violation, he would be entitled to the perpetual injunction unless the appellant can show that there is something special in the circumstances of the case that will disentitle the respondent of the remedy he seeks. The facts about the encroachment in question are unusually clear and sharp constituting an unanswerable case of private nuisance for which an interlocutory mandatory injunction was the appropriate and necessary remedy even though it gave the whole of the remedy asked for in the action.

[5] Damages would not be an adequate remedy as the respondent has commenced construction on the hotel, which is now at a standstill because of the trespass. The respondent has expended considerable amount of time, effort and money and would suffer irreparable damage if the injunction was lifted.

Obiter dicta:

To avoid potential litigation with a vendor, a buyer should, in addition to making a search on the document of title at the Registry of Titles or the Land Office, also make searches at other government offices or local authorities for anything that concerns the land in an adverse way, such as the conditions in question imposed on the landowner or rather the predecessor in title of the appellant. The buyer could also make written requisitions to the vendor for similar information which is adverse to the land as conveyancing solicitors in England are accustomed to do.

[Appeal dismissed with costs].

[Bahasa Malaysia Translation of Headnote]

TORT: Pencerobohan tanah - Tuan tanah diberi kebenaran untuk membina anjungan pada bangunan yang sedia ada - Anjungan menceroboh lot yang bersebelahan - Lot yang bersebelahan kosong - Kebenaran diberi dengan syarat bahawa anjungan itu akan dirobohkan apabila lot yang bersebelahan itu diduduki - Defendan membeli hartanah daripada tuan tanah - Plaintif menjadi tuan tanah lot yang bersebelahan - Plaintif memohon untuk merobohkan anjungan - Defendan enggan - Plaintif mendapatkan injunksi mandatori interlokutori - Defendan merayu terhadap perintah - Sama ada terdapat pencerobohan pada tanah plaintif - Sama ada defendan terikat oleh akujanji yang telah diberikan oleh tuan tanah yang tendahulu - Sama ada injunksi harus dilepaskan.

UNDANG-UNDANG TANAH: Anjungan pada bangunan yang sedia ada - Anjungan menceroboh lot yang bersebelahan - Tuan tanah mengakujanji untuk merobohkan anjungan - Sama ada akujanji sedemikian boleh diendorskan pada hakmilik - Pemakaian s. 120 Kanun Tanah Negara 1965 - Sama ada akujanji yang sedemikian adalah merupakan "syarat" dalam lingkungan maksud s. 116(1) Kanun tersebut.

Plaintif/responden adalah tuanpunya sebidang tanah di Brinchang, Cameron Highlands (Lot 25). Tuanpunya tanah yang bersebelahan (Lot 26) telah mendapatkan kebenaran untuk mendirikan anjungan kepada bangunannya bagi tujuan hiasan.

Pada waktu itu kebenaran telah diberikan, Lot 25 adalah lot kosong. Kebenaran telah diberikan atas akujanji bahawa anjungan tersebut akan dirobohkan apabila pembeli Lot 25 ingin membina sebuah bangunan di atas lot tersebut.

Plaintif telah mendapatkan kebenaran untuk membina sebuah hotel 4 tingkat di atas Lot 25 dan meminta defendan/perayu, yang telah menjadi tuanpunya Lot 26, untuk merobohkan anjungan tersebut. Defendan enggan dan plaintif telah mendapatkan injunksi mandatori interlokutori yang memerintah defendan untuk merobohkan anjungan tersebut dan kesemua rupa-bentuk pencerobohan yang menceroboh atas Lot 25. Defendan telah merayu.

Diputuskan:

[1] Akujanji untuk merobohkan anjungan tersebut, yang mana adalah sebenarnya bersifat hiasan, tidak terlingkung di bawah kehendak s. 120 Kanun Tanah Negara 1965 (KTN 1965) dan dengan itu tidak boleh diendorskan pada hakmilik dan oleh yang demikian tidak akan dapat dikesan di Pejabat Tanah. Begitu juga akujanji tersebut tidak merupakan sejenis "syarat" yang dipertimbangkan dalam s. 116(1) KTN 1965. Anjungan-anjungan tersebut adalah lebih bersifat pencerobohan pada ruang udara.

[2] KTN 1965 memperuntukkan antara lainnya bahawa mana-mana orang yang telah diberimilik tanah "akan berhak kepada penggunaan eksklusif dan menikmati seberapa banyak ruang udara di atas permukaan tanah tersebut, dan seberapa banyak luas tanah di bawah permukaan itu, sepertimana adalah dengan wajarnya perlu untuk penggunaan tanah tersebut dan menikmatinya dengan cara yang sah". Dalam keadaan yang sedemikian, tuanpunya Lot 26 tidak mempunyai hak yang sah di sisi undang-undang untuk menceroboh ke dalam ruang udara Lot 25 kecuali tuanpunya Lot 25 membenarkannya.

[3] Di dalam kes pencerobohan tanah dan ruang udara yang telah dilakukan oleh tuanpunya lot yang bersebelahan sebegini serius sepertimana yang terdapat dalam kes ini, tuanpunya terkilan bagi lot atas mana pencerobohan tersebut dilakukan adalah berhak kepada injunksi mandatori interlokutori melalui yang mana untuk merobohkan punca pencerobohan tersebut tanpa menghiraukan bahawa punca pencerobohan tersebut telah pun wujud sebelum tuanpunya yang baru memilik tanah tersebut dan sama ada beliau mengetahui tentangnya atau pun telah memerhatikannya atau tidak. Sebagai merupkan tuanpunya berdaftar semasa perayu adalah terikat kepada kewajipan untuk merobohkan anjungan tersebut.

[4] Oleh kerana responden telah menentukan hak-haknya yang sah di sisi undang-undang dan fakta tentang pelanggarannya, beliau akan berhak kepada injunksi berkekalan tersebut kecuali perayu dapat menunjukkan bahawa terdapat sesuatu yang istimewa dalam keadaan kes tersebut yang boleh melucutkan hak responden terhadap remedi yang beliau pohon. Fakta-fakta tentang persoalan pencerobohan adalah jelas dan sungguh ketara dengan cara yang luar biasa yang mana membentuk satu kes kacau-ganggu persendirian yang tidak dapat dijawab bagi yang mana satu injunksi mandatori interlokutori adalah merupakan remedi yang wajar dan perlu walaupun ianya memberikan keseluruhan remedi yang dipohon dalam tindakan ini.

[5] Gantirugi tidak akan merupakan remedi yang memadai kerana responden telah pun memulakan pembinaan hotel tersebut, yang mana kini terhenti sama sekali disebabkan oleh pencerobohan tersebut. Responden telah menghabiskan masa yang banyak, usaha serta wang dan akan mengalami gantirugi yang tidak boleh diperbaiki jika injunksi tersebut dibatalkan.

Obiter dicta:

Untuk mengelakkan apa-apa litigasi yang bakal dengan penjual, seseorang pembeli, selain daripada membuat satu carian ke atas dokumen hakmilik di Pejabat Pendaftar Hakmilik atau Pejabat Tanah, seharusnya juga membuat carian di pejabat-pejabat tanah atau pihak-pihak berkuasa tempatan yang lain untuk apa-apa jua yang berkaitan dengan tanah tersebut dalam cara yang merugikan, seperti syarat-syarat yang dipersoalkan yang telah dikenakan ke atas tuan-tanah atau pun pendulu dalam hakmilik perayu. Pembeli juga boleh membuat rekuisisi bertulis kepada penjual untuk maklumat yang sama yang bertentang dengan tanah tersebut sepertimana peguamcara pemindahhakan di England biasa lakukan.

[Rayuan ditolak dengan kos].

Cases referred to:
Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd. [1979] 1 MLJ 150 ***(refd)***
Ng Yee Fong & Anor. v. E.W. Talalla [1986] 1 MLJ 25 ***(refd)***
Shepherd Home Ltd. v. Sandham [1971] Ch. 340 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 5, 115, 116(1)(a), 120(2), (3), 122

For the appellant - Pushpam Subramaniam (R. Jegathesan with her); M/s. Pushpam & Co.
For the respondent - V.S. Viswanathan; M/s. Kean Chye & Sivalingam

JUDGMENT

Haji Lamin Bin Haji Mohd Yunus FCJ:

This is an appeal from the order of the learned Judge below made on 22 January 1992 granting an interlocutory mandatory injunction as prayed for by the respondent/plaintiff in prayers (c) and (d) in his summons-in-chambers dated 22 September 1990. The rest of the prayers are to be determined at the trial of the action itself. The prayers (c) and (d) as in the order read:

> It Is Ordered and directed that the defendant, Karuppannan a/l Chellapan by himself his agents or servants do forthwith:
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> (c) Seal the side exit and side windows and remove, pull down or demolish the protrusions sewerage piping system manholes and septic tanks and all other illegal and/or unlawful encroachments encroaching upon or overhanging any part of H.S. (D) 197 No. P.T. Lot 25 Section 3 in the Township of Brinchang, Cameron Highlands in the State of Pahang.
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> (d) Alternatively, in the event that the defendant does not comply with the order of Court within thirty (30) days from the date of this order of Court herein, the plaintiff or his agents or servants be entitled to do so at the costs of the defendant.

The respondent/plaintiff is the registered owner of the land held under H.S. (D) 197 P.T. No. Lot 25 Section 3 in the Township of Brinchang, Cameron Highlands in the State of Pahang. The adjacent lot i.e. Lot 26 belongs to the appellant/defendant. In Lot 26 there was originally a 4-storey shop-house erected and subsequently, as alleged in the respondent/plaintiff's statement of claim, the same building was converted into a hotel. The appellant/defendant's predecessor-in-title, Madam Chong Lai Chun, by her letter to the Pengerusi Lembaga Bandaran Cameron Highlands dated 31 October 1978 applied that she be allowed to build the side-windows with protrusions to them (protruding into Lot 25) purely for aesthetic value (untuk tujuan mencantikan) and at the same time in her application she undertook to remove them so that they would not

obstruct the construction of any building in the neighbouring lot and without making any claim for compensation. At the time of application, Lot 25 was still a vacant lot. Her application was approved and in the approval letter it was repeated that those protrusions encroaching into the neighbouring lot must be removed the moment the registered owner intends to have a building on it. Now that the vacant lot (Lot 25) has a registered owner currently in the person of the respondent/plaintiff and because he intends to build a hotel on it, the plan of which has been approved, he has therefore asked the appellant/defendant to remove those protrusions. But the appellant/defendant has failed to do so hence the filing of the abovesaid summons-in-chambers and a writ. The respondent/plaintiff is also alleging trespass against the appellant/defendant for having constructed a side-exit to the said building, sewerage piping system, manholes and septic tank.

Cik Pushpam Subramaniam, Counsel for the appellant/defendant, in dealing with grounds 8, 9, 10 and 15 of her memorandum of appeal submitted that her client purchased a 4-storey hotel building together with land i.e. Lot 26 on which the hotel stands and for the purpose entered into a sale and purchase agreement on 20 January 1984 and the sale was complete upon making final payment of the purchase price within 3 months and that would have been 19 April 1984. It is true that that date coincides with the date of the issue of the certificate of fitness for occupation of the said 4-storey building. At the time of purchase the adjacent Lot 25 was still vacant land. Learned Counsel submitted that her client was an innocent purchaser without notice of any of the conditions or undertakings attached to the construction of the building on Lot 26. She said an official search was conducted and there was no disclosure of conditions. The certificate of fitness too was issued without any condition. Even the sale and purchase agreement, she said, did not disclose any encumbrance or undertaking. She went on to say that the valuation report undertaken by M/s. Khong and Jaafar Sdn. Bhd. at the insistence of the Bank (HSBC) too did not disclose any encumbrance. As her client had no notice of Madam Chong Lai Chun's undertaking to remove all those protrusions, he was not legally bound to comply. Even if he knew, he could not be made to comply and in fact according to her, since the Lembaga Bandaran approved it, it would be for the Lembaga Bandaran to pull them down.

In this case it is quite clear to us that Madam Chong's letter of application dated 31 October 1978 contains an undertaking to remove those protrusions. It would appear that the said Lembaga Bandaran allowed their construction on condition that she would keep her promise or undertaking to remove them. In our view this is nothing more than a personal undertaking. Having taken that stand and in view of the circumstances of this case we really need not trouble ourselves to go any further. However after having heard Counsel's submission impressing upon us that such an undertaking was something of a creature that could be traced in the Land Office if there was one (though learned Counsel never attempted to enlighten us whether it is capable of registration or endorsement) we feel bound somewhat to give a little explanation what that creature is in the context of the National Land Code. The Code allows certain types of conditions and restrictions in interest to be endorsed on a document of title in respect of an alienated land. Section 5 of the Code lays down the definition of what is "condition" and what is "restriction in interest". It says "condition" "does not include any restriction in interest". "Restriction in interest" means any limitation imposed by the State Authority on any of the powers conferred on a proprietor by Part Nine or on any of his powers of dealing under Part IV, and any like limitation imposed under any previous land law. As to "condition" there are two types, one is called "implied' and the other "express". "Implied"

conditions are those imposed by the Code on the various categories of land use such as "Agriculture" (s. 115), "Building" (s. 116) and so on. None of the implied conditions has the character which comes anywhere close to the undertaking in our case. Some semblance of it may be read into s. 116(1)(a) which reads:

> that no such building shall be demolished, altered or extended without the prior consent in writing of the appropriate Authority.

This provision talks about demolition, alteration and extension of the building itself and not something pertaining to the decorative aspect of the building. They refer to something permanent and the further legal requirement in regard to the construction of buildings is that they must be confined within the boundaries of the particular lot as is reflected in condition (i) contained in the letter of the Lembaga Bandaran of 28 March 1978. Condition (i) of the said letter reads "Balcony menunjul ke lot sebelah tidak diluluskan." The Lembaga in its subsequent letter of 22 December 1978 repeated the condition in para 2 which reads:

> Binaan-binaan yang menyentuh/menunjul ke dalam lot sebelah (sekarang ini kawasan lapang) apabila diberi hak milik dan yang berkenaan bercadang mendirikan bangunan maka binaan-binaan itu hendaklah dibuka iaitu seperti window shades dan door-steps tanpa menuntut ganti rugi dan sebagainya.

The "undertaking" in our case does not therefore relate to the implied condition as above and even if it does certainly it is one that does not require endorsement on the document of title as it is a statutory direction. Whereas "express" conditions and restrictions in interest (conformable to law) must be endorsed on the document of title as is required by s. 120(3) of the Code. They must first "be determined by the State Authority at the time when the land is approved for alienation" (Section 120(2)). The express conditions that can be imposed on the category of land use for "building" are those:

> With respect to:
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> (a) the area or proportion of the land to be built up;
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> (b) the type, design, height and structure of any building to be erected on the land, and the type and quality of the materials to be used in its construction;
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> (c) the dates on or before which any such building is to be commenced or completed;
>
> (d) the use to which any building is to be put. (Section 122).

The undertaking to remove those protrusions which are really decorative in nature cannot come within the requirement of s. 120 and therefore are not capable of being endorsed on the title and so will not be traceable at the Land Office. Neither is it a type of "condition" that is envisaged in s. 116(1). The intrusion in our view that the Lembaga Bandaran was concerned about was something affecting trespass to air space. The Code provides that any person or body to whom land has been alienated, reserved land has been leased or temporary occupation licence has been granted in respect of any land "shall be entitled to the exclusive use and enjoyment of so much of the column of air space above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land." In clear terms the law has spelt the right of an individual over his land. He is given the "exclusive use and enjoyment" of the air space above the surface of his land though not right to heaven above. The owner of Lot 26 has no legal right to encroach into the air space of Lot 25 unless of course the owner of Lot 25 allows it.

The word, "encumbrances" does not merely consist of conditions or restrictions in interest that normally appear on a document of title to land. It encompasses any matter concerning the land or its owner when any such matter eg. fetters the right of the owner to deal with his land or to enjoy his land in a normal way. Such encumbrance, which does not appear on a document of title, may take the form of some gazetted intention for compulsory acquisition of land, or the presentation of a winding-up petition against a corporate owner of the land.

In Malaysia, intending purchasers of land commonly make a check or search on the document of title at a Registry of Titles or Land Office as the case may be and hopes for the best by imposing the familiar condition on the vendor to give a transfer free "from all encumbrances".

To avoid potential litigation with such a vendor, a buyer should, in an even better way, also make searches at other government offices or local authorities for anything that concerns the land in an adverse way, such as the conditions in question imposed on the landowner or rather the predecessor in title of the appellant. The buyer, instead of making a search in the local authorities etc., can also make written requisitions to the vendor for similar information which is adverse to the land as conveyancing solicitors in England are accustomed to do.

Now, to say that the appellant/defendant has no knowledge of the protrusions, we somehow find it difficult to accept such a statement. His address as can be seen from the issue document of title at the time of transfer of Lot 26 to himself is No. 20, New Town Brinchang, Cameron Highlands and so he is very much a local resident. We can assume that he has been negotiating for the purchase of the land and building even before the completion of the building itself since the date of the issuance of the certificate of fitness for occupation coincided with the date of final payment of the purchase price of the building. Needless to say that Brinchang is a small town and one can take judicial notice of the fact that most of the residents of the town know one another and also know the kind of development that takes place from time to time. In the case before us the appellant/defendant is a local resident and is a purchaser of a 4-storey hotel building. With confidence we say, he cannot be a simpleton. He must have visited the land and the building. He must therefore know the boundaries of his land and his Counsel even now admits that he now knows where the boundaries are. We are sure not just now. He has known of them for some time at the very least. Being one who is not a simpleton, he must have noticed and very likely he must also have enquired of the protrusions. With or without knowledge of the existence of the protrusions he is answerable in law in regard to the trespass into the air space of his neighbour. Being the current registered owner he is duty bound to remove them. No doubt it is the personal undertaking of Madam Chong. But she is no more the owner of Lot 26 and the building on it. Compensation from Madam Chong may be his only redress for expenses incurred in the removal of those protrusions. But that is between him and Madam Chong. So whatever that protrudes or encroaches into Lot 25, including the fire exit and the septic tank, the owner of Lot 25 is entitled to have them removed.

It is interesting to note that throughout the submission of the Counsel for the appellant/ defendant we were made to understand that the building on Lot 26 which the appellant/ defendant purchased was a 4-storey hotel and she expressed anxiety as to the well being of the hotel guests should the injunction remain. But the express condition on the title stipulates "a shop-house" that is to say that the owner was to build a shop-house. This is repeated in the valuation report requested for to be prepared by the

appellant/defendant himself (see p. 267). No less than seven express conditions appear on the title. Condition No. (vi) stipulates that "The lessee shall not make use of the premises to be erected on the lot hereby leased for any purpose other than that approved by the Chairman, Town Board, Cameron Highlands." Even the certificate of fitness for occupation still spells it out as "Rumah Kedai 4 Tingkat." All the drawing plans appearing in the appeal record do not reflect that the buildings is that of a hotel.

Counsel for the appellant/defendant in the course of her submission informed us that fraud would be part of her client's defence and prayed for the appeal to be allowed and to go for trial. We have noted her client's allegation of fraud which appears in paragraph 15(b) of his defence. The allegation is directed solely at the manner of disposal of the "open space" (Lot 25). Learned Counsel informed us that they would be alleging fraud not only against the respondent/plaintiff but also against the Majlis Daerah Cameron Highlands. She gave indications how the fraud came about. For example she said that the area of the open space (Lot 25) has been clearly demarcated with adjacent lots have been finally surveyed and yet only Surat Hakmilik Sementara was issued to the respondent/plaintiff and not a final title. The yearly land revenue was originally RM30 and then cancelled and substituted with the figure RM400. The appeal before us is against the order dated 22 January 1992 essentially pertaining to the granting of the interlocutory mandatory injunction to the respondent/plaintiff ordering the appellant/defendant to seal, remove and demolish those items as spelt out in the order. We are only concerned with what have been constructed in Lot 26 the parts of which have encroached into Lot 25. We are not convinced how the question of the manner of disposal of Lot 25 and therefore the allegation of fraud can be relevant to the matter before us.

As regards the case for the respondent/plaintiff he has deposed *inter alia* that he has obtained planning permission to build a hotel on Lot 25 and has entered into a contract with contractors to build the hotel which he did on 29 October 1990. The works were to be completed within 18 months. The Hongkong and Shanghai Banking Corporation, Cameron Highlands had indicated that the banking facilities for the purpose of the construction of the hotel would be withdrawn if construction works did not commence by February 1992. Construction works have however commenced but owing to the trespass on his land and air space by the appellant/defendant the works cannot be continued and are at a standstill. He has expended considerable amount of time, effort and money. If the injunction is lifted, he would suffer irreparable damage. Damages would not be an adequate remedy.

Counsel for the appellant/defendant cited the case of *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150 in support of her contention that there are no exceptional circumstances as to merit the granting of an interlocutory mandatory injunction before trial. The injunction she mentioned would virtually give the respondent/plaintiff the full relief sought to be secured. With respect the learned Counsel has oversimplified the *ratio* in *Sivaperuman.*

We need only repeat what Abdoolcader J., as he then was, said:

> I have earlier pointed out that the interlocutory injunction granted is mandatory in effect and substance and the dismissal of the appellant has been referred to and is pending before the Industrial Court as a trade dispute. In *Harold Stephen & Co. Ltd. & Ors. v. Post Office* [1978] 1 All ER 939, 944, a decision of the Court of Appeal in England in July last year, Geoffrey Lane LJ said (at p. 944):
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> > Finally, and most seriously as I see it, the ground on which I would primarily base my decision would be this. It can only be in very rare circumstances and in the most

extreme circumstances that this Court should interfere by way of mandatory injunction in the delicate mechanism of industrial disputes and industrial negotiations.

It is argued that there have been cases where an interlocutory mandatory injunction has been granted before trial even though the full relief sought is secured by the respondents. Perhaps more in point is the case of *Ng Yee Fong & Anor. v. E.W. Talalla* [1986] 1 MLJ 25. This is a case where the respondent had applied for and obtained a mandatory injunction to remove the septic tank and fence which formed part of the appellant's premises but which had been constructed on the respondent's land. The appellant purchased Lot 126 with actual knowledge of the encroachment on respondent's Lot 179. Full disclosures were made in the sale and purchase agreement as to the encroachment. Notwithstanding, this Court did point out that the respondent never gave his assent either expressly or impliedly to the continued existence of the septic tank and the fence on his land ever since he became aware of it in 1970. Similarly in the case before us. Here we wish to repeat that once a party and in this case the respondent/plaintiff has established his legal right and of the fact of its violation he is entitled to the perpetual injunction unless the appellant/defendant can show that there is something special in the circumstances of the case that will disentitle the respondent/plaintiff to the remedy he seeks.

The facts about the encroachment in question in this case are unusually clear and sharp constituting an unanswerable case of private nuisance for which an interlocutory mandatory injunction was the appropriate and necessary remedy even though it gave the whole of the remedy asked for in the action. Please see *Shepherd Home Ltd. v. Sandham* [1971] Ch. 340.

As we have said, in the case of a trespass to land and air space committed by the owner of an adjacent lot as serious as in this case, the aggrieved owner of the lot upon which trespass is committed is entitled to an interlocutory mandatory injunction by which to have the source of trespass removed notwithstanding that the source of the trespass had already been in existence before the new owner came to own the land and whether he knew or had notice of it or not.

As to damages, we are satisfied that this is not a matter of a trivial act of trespass so that the resultant injury or damage can be adequately compensated. The respondent/plaintiff has obtained approval for the construction of a 4-storey hotel building and works have commenced and because of the trespass they are now at a standstill. This delay and the problems of resumption of works and the loss of business will all contribute to the quantum of damages.

In the circumstances the appeal is dismissed with costs here and below. The deposit in Court is to be paid out to the respondent on account of taxed costs.